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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Jan Osborn,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.  
15

No. CV-15-02421-PHX-JZB

**ORDER**

16 Plaintiff Jan Osborn seeks review of the Social Security Administration  
17 Commissioner's decision denying her application for benefits under the Social Security  
18 Act. (Doc. 21; Doc. 26.) For the reasons below, the Court will remand this matter for  
19 further proceedings.

20 **I. Background**

21 On December 30, 2013, Plaintiff filed a Title II application for a period of  
22 disability and disability insurance benefits, alleging an onset date of January 1, 2012.  
23 (AR<sup>1</sup> 16.) Plaintiff's application was initially denied on May 2, 2014, and denied upon  
24 reconsideration on December 10, 2014. (*Id.*)

25 Pursuant to Plaintiff's request, a hearing was held on June 9, 2015, before  
26 Administrative Law Judge (ALJ) Carla L. Waters. (*Id.*) In a decision dated July 31,  
27 2015, the ALJ ruled Plaintiff is not entitled to disability benefits because she is "not  
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<sup>1</sup> Citations to "AR" are to the administrative record.

1 disabled under sections 216(i) and 223(d) of the Social Security Act.” (*Id.* at 24.) On  
2 September 24, 2015, the Appeals Council denied Plaintiff’s request for review of the  
3 ALJ’s decision, making the ALJ’s decision the final decision of the Commissioner of the  
4 Social Security Administration. (*Id.* at 1-3.)

5 Having exhausted the administrative review process, on November 25, 2015,  
6 Plaintiff sought judicial review of the ALJ’s decision by filing a Complaint in this Court  
7 pursuant to 42 U.S.C. § 405(g). (Doc. 1.) On July 27, 2016, Plaintiff filed an Opening  
8 Brief, seeking remand of this case to the Social Security Administration for an award of  
9 benefits or, in the alternative, for further proceedings. (Doc. 21.) On September 26, 2016,  
10 Defendant filed a Response Brief in support of the Commissioner’s decision. (Doc. 25.)  
11 On October 11, 2016, Plaintiff filed a Reply Brief. (Doc. 26.)

## 12 **II. Legal Standards**

### 13 **a. Standard of Review**

14 The Social Security Act, 42 U.S.C. § 405(g), provides for judicial review of the  
15 Commissioner’s disability benefits determinations. The Court may set aside the  
16 Commissioner’s disability determination only if the determination is not supported by  
17 substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.  
18 2007); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). “‘Substantial evidence’  
19 means more than a mere scintilla, but less than a preponderance; it is such relevant  
20 evidence as a reasonable person might accept as adequate to support a conclusion.”  
21 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007); *see also Reddick v. Chater*,  
22 157 F.3d 715, 720 (9th Cir. 1998).

23 In determining whether substantial evidence supports the ALJ’s decision, the  
24 Court considers the record as a whole, weighing both the evidence that supports and that  
25 which detracts from the ALJ’s conclusions. *Reddick*, 157 F.3d at 720; *Tylitzki v. Shalala*,  
26 999 F.2d 1411, 1413 (9th Cir. 1993). The ALJ is responsible for resolving conflicts,  
27 ambiguity, and determining credibility. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.  
28 1995); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The Court “must

uphold the ALJ's decision where the evidence is susceptible to more than one rational interpretation." *Andrews*, 53 F.3d at 1039. "However, a reviewing court must consider the entire record as a whole and may not affirm simply by isolating a 'specific quantum of supporting evidence.'" *Orn*, 495 F.3d at 630 (quoting *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). The Court reviews only those issues raised by the party challenging the ALJ's decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). Similarly, the Court reviews "only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely." *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014).

#### **b. The ALJ's Five-Step Evaluation Process**

To be eligible for Social Security benefits, a claimant must show an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). A person is under a disability only:

if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

42 U.S.C. § 423(d)(2)(A).

The ALJ follows a five-step evaluation process to determine whether an applicant is disabled under the Social Security Act:

The five-step process for disability determinations begins, at the first and second steps, by asking whether a claimant is engaged in "substantial gainful activity" and considering the severity of the claimant's impairments. *See* 20 C.F.R. § 416.920(a)(4)(i)-(ii). If the inquiry continues beyond the second step, the third step asks whether the claimant's impairment or combination of impairments meets or equals a listing under 20 C.F.R. pt. 404, subpt. P, app. 1 and meets the duration requirement. *See id.* § 416.920(a)(4)(iii). If so, the claimant is considered disabled and benefits are awarded,

1 ending the inquiry. *See id.* If the process continues beyond  
2 the third step, the fourth and fifth steps consider the  
3 claimant's "residual functional capacity" [(RFC)] in  
4 determining whether the claimant can still do past relevant  
5 work or make an adjustment to other work. *See id.* §  
6 416.920(a)(4)(iv)-(v).

7 *Kennedy v. Colvin*, 738 F.3d 1172, 1175 (9th Cir. 2013). "The burden of proof is on the  
8 claimant at steps one through four, but shifts to the Commissioner at step five." *Bray v.*  
9 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009).

10 Applying the five-step evaluation process, the ALJ found that Plaintiff is not  
11 disabled and is not entitled to benefits. (AR 16-24.) At step one, the ALJ found that  
12 Plaintiff had not engaged in substantial gainful activity since the alleged onset date  
13 through her last date insured. (*Id.* at 18.) At step two, the ALJ found that Plaintiff had  
14 the following severe impairments: status post breast cancer with bilateral mastectomies,  
15 anterior hypertrophic spurs of the lumbar and thoracic spine, asthma, peripheral  
16 neuropathy, and status post peripheral pulmonary embolism. (*Id.*) At step three, the ALJ  
17 determined that Plaintiff does not have an impairment or combination of impairments that  
18 meet or medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R.  
19 Pt. 404. (*Id.* at 20.)

20 At step four, the ALJ found the following:

21 [Plaintiff] had the [RFC] to perform sedentary work as  
22 defined in 20 CFR § 404.1567(a) except she is able to stand  
23 and/or walk for a total of 6 hours in an 8-hour day. She can  
24 occasionally climb and balance; frequently kneel, crouch, and  
25 crawl. [Plaintiff] should avoid concentrated exposure to  
26 odors, dust, fumes, and gases.

27 (*Id.*) The ALJ further found that Plaintiff "was capable of performing past relevant work  
28 as an insurance sales agent and telephone solicitor. This work did not require the  
performance of work-related activities precluded by" Plaintiff's RFC. (*Id.* at 24.) Given  
that finding, the ALJ concluded that Plaintiff "was not under a disability, as defined in  
the Social Security Act, at any time from January 1, 2012, the alleged onset date, through  
December 31, 2014, the date last insured." (*Id.*)

### III. Analysis

Plaintiff argues that the ALJ's decision is defective for three reasons: (1) the ALJ erred in finding Plaintiff's mental impairments not severe at step two of the five-step analysis; (2) the ALJ improperly rejected the medical opinions of Plaintiff's treating physician; and (3) the ALJ improperly rejected Plaintiff's symptom testimony. The Court addresses each argument below. (Doc. 21.)

#### a. Severe Mental Impairment

##### i. Legal Standard

Plaintiff argues that the ALJ erred in finding Plaintiff's mental impairments "not severe" at step two of the five-step analysis. (*Id.* at 10-15.) At step two, the ALJ considers the medical severity of the claimant's impairments. 20 C.F.R. § 404.1520(a)(4)(ii). To find the claimant's impairment severe, the impairment or combination of impairments must significantly limit the claimant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(c). Basic work activities include: physical functions; capacities for seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgment; responding appropriately to usual work situations; and dealing with changes in a routine work setting. 20 C.F.R. § 404.1521(b)(1)-(6). An impairment is "not severe" only if the evidence establishes a slight abnormality with minimal effect on the individual's ability to work. *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). The step-two inquiry is a *de minimis* screening device to dispose of groundless claims. *Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987).

Importantly, the inquiry "is to do no more than allow the [Social Security Administration] to deny benefits summarily to those applicants with impairments of a minimal nature which could never prevent a person from working." SSR 85-28, 1985 WL 56856 (internal quotations omitted). "[I]f an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation should not end with the not severe evaluation step." *Id.* Further, the ALJ "is required to consider the claimant's

1 subjective symptoms, such as pain or fatigue, in determining severity.” *Smolen*, 80 F.3d  
2 at 1273 (citing SSR 88-13). Thus, the Court’s task in reviewing a non-severe finding at  
3 step two is to “determine whether the ALJ had substantial evidence to find that the  
4 medical evidence clearly established that [Plaintiff] did not have a medically severe  
5 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th  
6 Cir. 2005).

7 The ALJ uses a “special technique” to evaluate medically determinable mental  
8 impairments at each level of the administrative review process. 20 C.F.R. § 404.1520a.  
9 The ALJ must rate the degree of claimant’s functional limitations resulting from the  
10 impairment. 20 C.F.R. § 404.1520a(c)(1). Rating the degree of functional limitation is a  
11 “complex and highly individualized process.” *Id.* There are four broad functional areas  
12 to rate a claimant’s degree of limitation: activities of daily living; social functioning;  
13 concentration, persistence, or pace; and episodes of decompensation. 20 C.F.R. §  
14 404.1520a(c)(3). The degree of limitation is rated on a five point scale: none, mild,  
15 moderate, marked, and extreme. 20 C.F.R. § 404.1520a(c)(4). The degree of functional  
16 limitation resulting from the impairment determines the severity of the claimant’s mental  
17 impairment. 20 C.F.R. § 404.1520a(d). The ALJ will generally conclude the claimant’s  
18 impairment is not severe if the ALJ finds that the degree of limitation in the first three  
19 areas as “none” or “mild,” unless there is evidence to the contrary. 20 C.F.R. §  
20 404.1520a(d)(1).

21 **ii. The ALJ erred in finding Plaintiff’s mental impairments not severe.**

22 Plaintiff argues that her testimony describing her difficulty concentrating and  
23 challenges with anxiety, medical evidence regarding her prescription medication  
24 regimen, and the state agency physician’s observation that Plaintiff appeared  
25 “hyperactive” show Plaintiff’s depressive and anxiety disorders are severe impairments.  
(Doc. 21 at 11-12.)

26 The ALJ acknowledged that Plaintiff’s depression and anxiety were “medically  
27 determinable mental impairments.” (AR 19.) However, the ALJ determined that the  
28 impairments “did not cause more than minimal limitation in the claimant’s ability to

1 perform basic mental work activities and were therefore nonsevere.” (*Id.*) The ALJ  
2 reasoned that (1) there are no medical records of psychiatric hospitalizations, mental  
3 health treatment, or medication; (2) Plaintiff’s mental impairments did not limit her daily  
4 living; (3) Plaintiff’s mental impairments did not limit her concentration, persistence or  
5 pace; and (4) Plaintiff’s mental impairments did not limit her social functioning. (*Id.*)

6 The Court finds the ALJ’s determination at step two that Plaintiff’s mental  
7 impairments were nonsevere is not supported by substantial evidence. First, the ALJ  
8 asserted that there were “no psychiatric hospitalizations, mental health treatment or  
9 medications.” (*Id.*) However, Plaintiff received mental health treatment from her  
10 primary care treating physician, Dr. William Womak, who prescribed Plaintiff Prozac  
11 and Trazodone, and gave Plaintiff a referral for psychological testing. (*Id.* at 286, 288,  
12 353.) Further, although there is no record of psychiatric hospitalizations, Dr. Birsen  
13 Yuzak, on whose opinions and findings the ALJ based her decision, noted Plaintiff  
14 “appeared to be hyperactive.” (*Id.* at 411.) Further, two years earlier, treatment notes  
15 from Plaintiff’s two visits to the emergency room in August 2012 also describe the  
16 Plaintiff as “anxious,” “somewhat erratic,” and a hospital case manager was concerned  
17 Plaintiff “wanted to harm herself.” (*Id.* at 234, 238, 265.) Plaintiff was eventually  
18 evaluated and “cleared from a psychiatric standpoint.” (*Id.* at 265.) This record evidence,  
19 cited by the ALJ, does not clearly establish that Plaintiff’s mental impairments were not  
20 severe.

21 Further, the record contains evidence regarding Plaintiff’s limited financial  
22 resources. However, the ALJ failed to address or consider Plaintiff’s financial status  
23 related to the lack of treatment records. (*Id.* at 19); *Edwards-Alexander v. Astrue*, 336 F.  
24 App’x. 634, 636 (9th Cir. 2009) (unpublished) (finding the ALJ incorrectly ruled  
25 claimant’s mental impairment was not severe by relying on claimant’s failure to seek  
26 psychiatric medical treatment even though the record showed the claimant could not  
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1 afford it).<sup>2</sup> Moreover, the lack of hospitalization does not necessarily render Plaintiff's  
2 mental impairments non-severe at step two.

3 Second, the ALJ analyzed the severity of Plaintiff's mental impairment using the  
4 20 C.F.R. § 404.1520a "special technique." (*Id.* at 19.) The ALJ concluded Plaintiff has  
5 no functional limitations and experienced no episodes of decompensation.<sup>3</sup> (*Id.* at 19.)  
6 The ALJ inadequately explained why Plaintiff's mental impairments do not limit her  
7 concentration, persistence, or pace. The ALJ reasoned that "treating medical  
8 professionals have not observed the claimant experience any difficulty with  
9 concentration." (*Id.* at 19.) However, the ALJ did not address Dr. Yuzak's report, which  
10 noted Plaintiff appeared to be "hyperactive" during the consultative exam, or the hospital  
11 record stating Plaintiff was "erratic." (*Id.* at 19, 238, 411.) Moreover, Plaintiff's  
12 Functional Report states that she cannot complete tasks, and she does not handle stress or  
13 changes in routine well. (*Id.* at 187-98.) Plaintiff also testified that she suffers from  
14 depression, has anxiety attacks, and has trouble concentrating and completing tasks. (*Id.*  
15 at 56-57.) The ALJ failed to specifically discuss this testimony. Therefore, the ALJ's  
16 determination that Plaintiff's mental impairments do not limit her concentration,  
17 persistence or pace is not supported by substantial evidence.

18 Finally, the ALJ inadequately supported her finding that Plaintiff's mental  
19 impairments do not limit her daily living. The ALJ cited to Plaintiff's Functional Report,  
20 in which Plaintiff reported she can care for pets, handle personal care, socialize with  
21 neighbors, and use public transportation. (*Id.* at 19.) However, the ALJ did not address

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22 <sup>2</sup> Plaintiff also argues the ALJ should have sent her for a psychological evaluation  
23 because the ALJ had a duty to develop the record. (Doc. 21 at 12.) However, as detailed  
24 below, the Court will remand this matter for further consideration of Plaintiff's mental  
25 impairments. The ALJ will therefore have an opportunity to obtain additional medical  
26 opinion evidence on remand if appropriate.

27 <sup>3</sup> Plaintiff argues the ALJ should have conducted this evaluation of mental impairments at  
28 step three, not at step two, of the disability evaluation process. (Doc. 21 at 15.) However,  
the Ninth Circuit has held that the ALJ is bound by 20 C.F.R. § 404.1520a at step two of  
the disability determination. *Keyser v. Comm'r Soc. Sec. Admin.*, 648 F.3d 721, 725 (9th  
Cir. 2011) (finding, at step two, that the "ALJ is bound by 20 C.F.R. § 404.1520a" when  
determining whether a claimant has a medically severe impairment). After the ALJ  
considers the degree of a claimant's functional limitation and determines the mental  
impairment is severe, then the ALJ proceeds to step three of the disability analysis. *Id.*



1 Plaintiff's statements that she is limited in house and yard work due in part to fatigue, or  
 2 Plaintiff's testimony regarding issues with her sleep schedule. (*Id.* at 55, 195.)  
 3 Specifically, Plaintiff testified that she will unintentionally fall asleep, and sometimes fall  
 4 asleep on a "Monday, and [wake] up on a Wednesday." (*Id.* at 55.) While the Court  
 5 acknowledges that Plaintiff noted many of her daily activities were limited due to her low  
 6 income, the ALJ failed to sufficiently explain how Plaintiff's daily activities are  
 7 inconsistent with severe depression or anxiety. *Edwards-Alexander*, 336 F. App'x. at 636  
 8 (finding the ALJ failed to explain the assertion that socializing a few times a week and  
 9 regular church attendance were inconsistent with severe depression).

10 The record as a whole "includes evidence of problems sufficient to pass the de  
 11 minimis threshold of step two." *Webb*, 433 F.3d at 687. Therefore, the Court finds that  
 12 the ALJ erred in determining that Plaintiff's mental impairments were not severe at step  
 13 two.

14 The Court also finds the ALJ's error was harmful. A step two error may be  
 15 harmless if the ALJ, in formulating the RFC determination, nevertheless considers "any  
 16 functional limitations" that might be caused by the impairment. *See Burch v. Barnhart*,  
 17 400 F.3d 676, 684 (9th Cir. 2005). But, here, in discussing the RFC, the ALJ simply  
 18 acknowledged and dismissed Plaintiff's alleged mental impairments:

19 The conclusion that the claimant does not have mental  
 20 functional limitations is supported by the lack of psychiatric  
 21 hospitalizations, lack of mental health treatment, and lack of  
 recommendations by other medical professionals for mental  
 health care.

22 (AR 23.) The ALJ did not otherwise account for these impairments in evaluating  
 23 Plaintiff's RFC. Thus, the ALJ committed harmful error in finding at step two that  
 24 Plaintiff's mental impairments were not severe.<sup>4</sup>

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 27 <sup>4</sup> The Court has found harmful error at step two and must vacate the Commissioner's  
 28 decision. However, the Court will analyze Plaintiff's other arguments of error in the  
 context of her severe physical impairments because they relate to Plaintiff's requested  
 relief of an immediate award of benefits.

1                   **b. Weighing of Medical Source Evidence**

2           Plaintiff next argues that the ALJ erred in weighing the opinions of Dr. William  
3   Womak, treating physician. (Doc. 21 at 15.) Below, the Court addresses the ALJ's  
4   treatment of Dr. Womak's opinions.

5                   **i. Legal Standard**

6           The Ninth Circuit distinguishes between the opinions of treating physicians,  
7   examining physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821,  
8   830 (9th Cir. 1995). Generally, an ALJ should give greatest weight to a treating  
9   physician's opinion and more weight to the opinion of an examining physician than to  
10   one of a non-examining physician. *See Andrews*, 53 F.3d at 1040-41; *see also* 20 C.F.R. §  
11   404.1527(c)(2)-(6). If it is not contradicted by another doctor's opinion, the opinion of a  
12   treating or examining physician can be rejected only for "clear and convincing" reasons.  
13   *Lester*, 81 F.3d at 830 (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). "If a  
14   treating or examining doctor's opinion is contradicted by another doctor's opinion, an  
15   ALJ may only reject it by providing specific and legitimate reasons that are supported by  
16   substantial evidence." *Garrison*, 759 F.3d at 1012 (quoting *Ryan v. Comm'r of Soc. Sec.*,  
17   528 F.3d 1194, 1198 (9th Cir. 2008)).

18           An ALJ can meet the "specific and legitimate reasons" standard "by setting out a  
19   detailed and thorough summary of the facts and conflicting clinical evidence, stating his  
20   interpretation thereof, and making findings." *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th  
21   Cir. 1986). But "[t]he ALJ must do more than offer his conclusions. He must set forth his  
22   own interpretations and explain why they, rather than the doctors', are correct." *Embrey*,  
23   849 F.2d at 421-22. "The opinion of a non-examining physician cannot by itself  
24   constitute substantial evidence that justifies the rejection of the opinion of either an  
25   examining *or* a treating physician." *Lester*, 81 F.3d at 831 (emphasis in original)  
26   (citations omitted).

27                   **ii. The ALJ did not err in assigning little weight to the opinions of  
28           treating physician, Dr. Womack.**

Dr. Womak began treating Plaintiff in 2008 for several conditions, including

1 spinal impairments, chronic pain, fatigue, asthma, and peripheral neuropathy. (AR 332-  
2 407, 417-23.) During the period of 2008 through 2015, Plaintiff saw Dr. Womak for  
3 evaluation of several symptoms, including respiratory complaints, back pain, neck pain,  
4 and anxiety. (*Id.*)

5 On September 22, 2014, Dr. Womak completed a Medical Assessment of Ability  
6 to Do Work-Related Physical Activities form. (*Id.* at 408-09.) Dr. Womak opined that:  
7 (1) Plaintiff cannot perform work eight hours a day, five days a week on a regular and  
8 consistent basis; (2) Plaintiff can sit for less than two hours in an eight-hour work day; (3)  
9 Plaintiff can stand/walk for less than two hours in an eight-hour work day; (4) Plaintiff  
10 can lift and carry less than ten pounds; (5) Plaintiff would not benefit from alternating  
11 between sitting, standing, or walking, and if Plaintiff changed positions she must  
12 periodically lie down to rest; (6) Plaintiff has moderate limitations of pain, fatigue,  
13 dizziness, and headaches; and (7) Plaintiff would miss more than six days from work  
14 each month. (*Id.*) On May 1, 2015, Dr. Womak completed a second Medical  
15 Assessment of Ability to Do Work-Related Physical Activities form with the same  
16 limitations, except he described Plaintiff's pain and fatigue as severe. (*Id.* at 424-25.)

17 Dr. Womak's opinions were contradicted by the opinions of examining physician,  
18 Dr. Birsen Yuzak, and non-examining physician, Dr. Martha Goodrich. (*Id.* at 77-80,  
19 410-16.) The ALJ could, therefore, discount Dr. Womak's opinions for specific and  
20 legitimate reasons supported by substantial evidence. *Lester*, 81 F.3d at 830-31.

21 The ALJ gave Dr. Womack's opinions little weight for the following reasons: (1)  
22 Dr. Womak's form and treatment notes do not support or explain the extreme limitations  
23 opined; (2) Dr. Womak prescribed Plaintiff conservative treatment and gave few  
24 recommendations for specialists; (3) Dr. Womak's opinions about Plaintiff's limitations  
25 were inconsistent with Dr. Birsen's and Dr. Goodrich's opinions; (4) Dr. Womak's  
26 opinions appear to be based on Plaintiff's subjective reports; (5) Dr. Womak is not a  
27 specialist; and (6) Dr. Womak's opinions are inconsistent with Plaintiff's daily activities.  
28 (AR 22-23.)

The Court finds that the ALJ gave specific and legitimate reasons supported by

1 substantial evidence for giving little weight to Dr. Womak's opinions. First, the ALJ  
2 asserted that Dr. Womak's opinions regarding Plaintiff's extensive sitting limitations  
3 were not supported or explained. (AR 22.) Dr. Womak opined that Plaintiff could sit for  
4 less than two hours in an eight-hour workday, but provided no explanation for the  
5 limitation besides noting that Plaintiff experienced pain in her "back and feet and neck."  
6 (*Id.* at 408.) Plaintiff asserts generally that Dr. Womak's opinions "drew upon his  
7 personal observations of his patient, gleaned over monthly examinations over the course  
8 of several years." (Doc. 21 at 16.) However, Plaintiff concedes, "Dr. Womack's record  
9 keeping may be less than that desired by the ALJ." (*Id.*) An ALJ may "permissibly  
10 reject[ ] ...check-off reports that [do] not contain any explanation of the bases of their  
11 conclusions." *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996); *Batson v. Comm'r of*  
12 *the Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (an ALJ may discredit treating  
13 physicians' opinions that are conclusory, brief, and unsupported by the record as a whole,  
14 or by objective medical findings).

15 Additionally, Dr. Womack's treatment notes do not support the limitations opined.  
16 Several of Dr. Womak's treatment notes reflect objective normal results or mild  
17 symptoms, and/or limited to no physical examination findings. (*See, e.g.*, AR 290, 295,  
18 301, 305, 313-18, 417-23.) Incongruity between a doctor's medical opinion and  
19 treatment notes is a specific and legitimate reason to discount that doctor's opinion.  
20 *Tommassetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Therefore, the ALJ did not  
21 err in rejecting Dr. Womak's opinions for this reason.

22 Second, the ALJ found that Dr. Womak prescribed a conservative course of  
23 treatment inconsistent with his determination that Plaintiff would miss six days of work  
24 per month and experience severe pain and fatigue. (AR 22.) Specifically, the ALJ noted  
25 that if Plaintiff had such severe limitations, the record would show treatment, including  
26 extensive medication, surgeries, and frequent medical monitoring, beyond the "routine  
27 medication management" documented in the treatment records. (*Id.*)

28 The treatment record supports the ALJ's findings. Several of Dr. Womak's  
treatment notes largely report Dr. Womak consistently recommended routine medication

1 management and Plaintiff primarily returned to Dr. Womak only to get refills for her  
2 prescriptions over the course of years. (AR 332-407, 417-23.) Therefore, it was  
3 reasonable for the ALJ to find that the record would show more aggressive treatment  
4 recommendations if Plaintiff were truly as limited as Dr. Womak opined. *See Rollins v.*  
5 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (finding that because a “conservative  
6 course of treatment” is “not the sort of recommendation one would expect to accompany  
7 a finding that [the Plaintiff] was totally disabled,” the ALJ “provided adequate reasons  
8 for not fully crediting [the treating physician’s] statements”); *see also Hanes v. Colvin*,  
9 651 F. App’x. 703, 705 (9th Cir. 2016) (unpublished) (holding that an “ALJ reasonably  
10 relied on . . . conservative treatment” consisting of “minimal medication, limited  
11 injections, physical therapy and gentle exercise” to “conclude that the assessments of  
12 [two treating physicians] were inconsistent with the objective evidence in the record”).

13 Plaintiff argues that the ALJ “presumes that Osborn could afford [additional]  
14 treatment, and that the treatment would necessarily provide a benefit greater than that  
15 achieved by Dr. Womak.” (Doc. 21 at 17.) However, Plaintiff does not point to any of  
16 Dr. Womak’s treatment notes or other clinical evidence to suggest Plaintiff needed, or Dr.  
17 Womak recommended, a more aggressive course of treatment. Rather, Dr. Womak’s  
18 treatment notes are void of specific findings regarding Plaintiff’s imaging of her back and  
19 chest, or thorough physical examinations. Besides briefly noting Plaintiff’s issues, the  
20 treatment notes and other objective evidence in the record provide little support for Dr.  
21 Womak’s opinions that Plaintiff has severe limitations on her ability to sit and stand, or  
22 that Plaintiff needs to miss more than six workdays a month. (AR 285-86, 295, 298, 304-  
23 05, 311, 346, 407-17.) Therefore, the ALJ did not err in rejecting Dr. Womack’s  
24 opinions on this basis.

25 Third, the ALJ found that Dr. Womak’s assessment is contradicted by the opinions  
26 of examining physician, Dr. Yuzak, and state agency, non-examining physician, Dr.  
27 Goodrich. (*Id.* at 23.)

28 On November 19, 2014, Dr. Yuzak examined Plaintiff and completed a Medical  
Source Statement of Ability to Do Work-Related Activities form. During the

1 examination, Dr. Yuzak noted that Plaintiff was able to get on and off the exam table  
2 quickly, she was able to get up from the sitting position quickly, she was able to grab  
3 bottles and lift them up and down three times without difficulty and without dropping  
4 them, her gait was normal, tandem toe-heel walking was normal, squatting was normal,  
5 Romber test was negative, she had a normal range of motion in her joints, spine, and  
6 thumb, straight leg tests were negative, there were no muscle spasms, she had normal  
7 muscle tone bulk and strength in her upper and lower extremities, her bilateral grip  
8 strength was normal, and she had sensitivity in her feet. (*Id.* at 412-13.) Based on these  
9 results, Dr. Yuzak opined that Plaintiff could lift 10 pounds, stand and/or walk for six  
10 hours in an eight-hour work day, and can sit for a full eight-hour work day. (*Id.* at 414-  
11 15.) Dr. Yuzak further opined that based on Plaintiff's chronic fatigue and peripheral  
12 neuropathy of the feet, she can frequently stoop, kneel, crouch, and crawl, can  
13 occasionally climb and balance, and is not limited in reaching, handling, fingering, or  
14 feeling. (*Id.* at 415-16.) Finally, Dr. Yuzak opined that Plaintiff is restricted from  
15 working around dust/fumes or gases due to her asthma. (*Id.* at 416.)

16 On December 9, 2014, state agency physician Dr. Goodrich completed a Disability  
17 Determination Explanation at the Reconsideration level based upon her review of the  
18 record. (*Id.* at 72-80.) Dr. Goodrich opined there was insufficient evidence detailing  
19 Plaintiff's impairments; therefore, Plaintiff's impairments were not severe. (*Id.* at 78-79.)  
20 Dr. Goodrich explained that there were only "rare exam documents and they are very  
21 superficial, the majority of visits document no physical exams at all." (*Id.* at 78.) She also  
22 noted that Plaintiff's medical record includes "no imaging or testing" and only one set of  
23 labs. (*Id.*) Moreover, Dr. Goodrich explained that Plaintiff was referred to a  
24 Consultative Examination because Plaintiff's primary care treating physician "does not  
25 document adequate exams." (*Id.*) She noted the Consultative Exam findings are "entirely  
26 normal except diminished sensation of the bilat [sic] feet," no "muscle spasm, or atrophy,  
27 no joint swelling or deformity, lungs were clear," and Plaintiff had normal strength,  
28 reflexes, and gaits. (*Id.*) Dr. Goodrich found Plaintiff's statements about the intensity,  
persistence, and functionally limiting effects of the symptoms were not substantiated by

1 the medical evidence alone. (*Id.* at 79.) She also referenced Plaintiff's medical history  
2 and noted there was evidence of mild peripheral pulmonary embolism and peripheral  
3 neuropathy. (*Id.* at 78.) The ALJ gave some weight to Dr. Goodrich's opinion, to the  
4 extent that Dr. Goodrich thoroughly analyzed the objective medical evidence. (*Id.* at 23.)  
5 However, the ALJ found that that there was sufficient evidence to make a determination  
6 regarding Plaintiff's RFC.

7 Plaintiff argues that the ALJ erred in relying on the opinions of Dr. Yuzak and Dr.  
8 Goodrich to discredit Dr. Womak's assessments because the ALJ failed to provide  
9 specific and legitimate reasons to reject the treating physician's opinion. (Doc. 21 at 22.)  
10 Plaintiff likewise generally asserts that "Dr. Yuzak's contrary findings do not justify the  
11 rejection of Dr. Womak's opinions." (*Id.* at 22.) However, as stated above, Dr. Yuzak's  
12 and Dr. Goodrich's assessments each cite to and analyze medical evidence in the record.

13 Further, Dr. Yuzak provided a report detailing his examination findings, which are  
14 consistent with the ALJ's findings regarding Plaintiff's limitations. Dr. Goodrich's  
15 analysis relied, in part, upon Dr. Yuzak's report. The Court finds Dr. Yuzak's objective  
16 findings and opinions are a sufficient basis upon which to reject Dr. Womak's opinions.  
17 *Batson*, 359 F.3d at 1195 (upholding ALJ's rejection of two treating physicians'  
18 opinions, in part because of their conflict with a consultative medical evaluation);  
19 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) (examining and reviewing source  
20 opinions constitute substantial evidence where consistent with independent clinical  
21 findings or other record evidence).

22 Fourth, the ALJ found that Dr. Womak's opinions are based on Plaintiff's  
23 subjective reports, rather than objective medical evidence, because the opinions deviate  
24 to such a degree from the objective medical evidence the ALJ discussed in the record.  
25 (AR 23.) The Court finds, based on the lack of objective findings that support Dr.  
26 Womack's opinions, that the ALJ properly gave little weight to Dr. Womak's opinions  
27 for this reason.

28 Plaintiff argues that Dr. Womak's assessments are based on x-ray evidence and  
supported by Dr. Yuzak's examination report, which found sensitivity in Plaintiff's feet



1 due to peripheral neuropathy. (Doc. 21 at 18-19.) However, Plaintiff cherry-picks from  
2 the record and ignores the overall objective findings. Dr. Yuzak's examination findings,  
3 as detailed above, largely contradict Plaintiff's arguments. And, as also stated above, Dr.  
4 Yuzak supported his opinion with clinical findings, whereas Dr. Womack's treatment  
5 notes rarely cite to any objective findings. *See Batson*, 359 F.3d at 1195 (finding that  
6 when a treating physician's opinions "do not have supporting objective evidence, [are]  
7 contradicted by statements and assessments of [Plaintiff's] medical condition, and [are]  
8 based on the [Plaintiff's] subjective descriptions of pain," the ALJ need not fully credit  
9 them); *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005) (finding that substantial  
10 evidence supports the ALJ's decision not to rely on physician's opinion that is based on  
11 plaintiff's complaints).

12 The Court finds that the remaining reasons provided by the ALJ for giving little  
13 weight to Dr. Womack's opinions, that Dr. Womack is not a specialist and his opinions  
14 are inconsistent with Plaintiff's daily activities, are not supported by substantial evidence.  
15 Generally, the ALJ may consider whether a treating physician is a specialist in  
16 determining how much relative weight to afford an opinion. *See* 20 C.F.R. §  
17 404.1527(c)(5) ("We generally give more weight to the medical opinion of a specialist  
18 about medical issues related to his or her area of specialty than to the medical opinion of  
19 a source who is not a specialist."). Here, however, the ALJ failed to cite to any evidence  
20 that Dr. Womack was not sufficiently qualified to opine regarding Plaintiff's limitations.  
21 *See Lester*, 81 F.3d at 833 (explaining that the Plaintiff's treating physician's opinion is  
22 "entitled to special weight" because the "physician's role [is to consider] all available  
23 information regarding" his patient's impairments" and "form an overall conclusion as to  
24 functional capacities and limitations").

25 The ALJ also did not discuss or make any finding regarding the amount of time  
26 per day that Plaintiff spends engaged in daily activities. *See Vertigan v. Halter*, 260 F.3d  
27 1044, 1050 (9th Cir. 2001) ("physical activities did not consume a substantial part of Ms.  
28 Vertigan's day. This court has repeatedly asserted that the mere fact that a plaintiff has  
carried on certain daily activities, such as grocery shopping, driving a car, or limited

1 walking for exercise, does not in any way detract from her credibility as to her overall  
 2 disability”). Therefore, the Court does not find this reason to be supported by substantial  
 3 evidence.

4 However, the Court finds that the ALJ’s reliance on the fact that Dr. Womak is not  
 5 a specialist and Plaintiff’s daily activities, even if erroneous, amounts to harmless error  
 6 because the ALJ provided other specific and legitimate reasons supported by substantial  
 7 evidence for discounting Dr. Womack’s opinions, as discussed at length above. *Molina*  
 8 *v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (An ALJ’s error is harmless where it is  
 9 “inconsequential to the ultimate nondisability determination.”) (quoting *Carmickle v.*  
 10 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)); *Howell v. Comm’r So.*  
 11 *Sec. Admin.*, 349 Fed. Appx. 181, 184 (9th Cir. 2009) (stating that “[a]n ALJ ought not  
 12 dismiss a treating physician’s testimony merely because it was contained on [a check off]  
 13 form” but finding any error in doing so harmless because ALJ had “enough evidence” to  
 14 reject the physician’s testimony).

15 Accordingly, the Court finds that the ALJ did not err in giving Dr. Womak’s  
 16 opinion little weight.

### 17 **c. Plaintiff’s Symptom Testimony**

#### 18 **i. Legal Standard**

19 Plaintiff argues that the ALJ erred in evaluating Plaintiff’s symptom testimony.  
 20 (Doc. 13 at 7-9.) An ALJ engages in a two-step analysis to determine whether a  
 21 claimant’s testimony regarding subjective pain or symptoms is credible. *Garrison*, 759  
 22 F.3d at 1014-15 (citing *Lingenfelter*, 504 F.3d at 1035-36). “First, the ALJ must  
 23 determine whether the claimant has presented objective medical evidence of an  
 24 underlying impairment ‘which could reasonably be expected to produce the pain or other  
 25 symptoms alleged.’” *Lingenfelter*, 504 F.3d at 1036 (quoting *Bunnell v. Sullivan*, 947  
 26 F.2d 341, 344 (9th Cir. 1991) (en banc)). The claimant is not required to show objective  
 27 medical evidence of the pain itself or of a causal relationship between the impairment and  
 28 the symptom. *Smolen*, 80 F.3d at 1282. Instead, the claimant must only show that an  
 objectively verifiable impairment “could reasonably be expected to produce his pain.”

1 *Lingenfelter*, 504 F.3d at 1036 (quoting *Smolen*, 80 F.3d at 1282); *see also Carmickle v.*  
2 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1160-61 (9th Cir. 2008) (“requiring that the  
3 medical impairment ‘could reasonably be expected to produce’ pain or another symptom  
4 . . . requires only that the causal relationship be a reasonable inference, not a medically  
5 proven phenomenon”).

6 Second, if a claimant shows that she suffers from an underlying medical  
7 impairment that could reasonably be expected to produce her pain or other symptoms, the  
8 ALJ must “evaluate the intensity and persistence of [the] symptoms” to determine how  
9 the symptoms, including pain, limit the claimant’s ability to work. *See* 20 C.F.R. §  
10 404.1529(c)(1). General assertions that the claimant’s testimony is not credible are  
11 insufficient. *See Parra v. Astrue*, 481 F.3d 742, 750 (9th Cir. 2007). The ALJ must  
12 identify “what testimony is not credible and what evidence undermines the claimant’s  
13 complaints.” *Id.* (citation omitted).

14 In weighing a claimant’s credibility, the ALJ may consider many factors,  
15 including, “(1) ordinary techniques of credibility evaluation, such as the claimant’s  
16 reputation for lying, prior inconsistent statements concerning the symptoms, and other  
17 testimony by the claimant that appears less than candid; (2) unexplained or inadequately  
18 explained failure to seek treatment or to follow a prescribed course of treatment; and (3)  
19 the claimant’s daily activities.” *Smolen*, 80 F.3d at 1284; *see Orn*, 495 F.3d at 637-39.  
20 The ALJ also considers “the claimant’s work record and observations of treating and  
21 examining physicians and other third parties regarding, among other matters, the nature,  
22 onset, duration, and frequency of the claimant’s symptom; precipitating and aggravating  
23 factors; [and] functional restrictions caused by the symptoms . . . .” *Smolen*, 80 F.3d at  
24 1284 (citation omitted).

25 At this second step, the ALJ may reject a claimant’s testimony regarding the  
26 severity of his or her symptoms only if the ALJ “makes a finding of malingering based on  
27 affirmative evidence,” *Lingenfelter*, 504 F.3d at 1036 (quoting *Robbins*, 466 F.3d at 883),  
28 or if the ALJ offers “clear and convincing reasons” for finding the claimant not credible.  
*Carmickle*, 533 F.3d at 1160 (quoting *Lingenfelter*, 504 F.3d at 1036). “‘The clear and

1 convincing standard is the most demanding required in Social Security Cases.’’  
2 *Garrison*, 793 F.3d at 1015 (quoting *Moore v. Comm’r of the Soc. Sec. Admin.*, 278 F.3d  
3 920, 924 (9th Cir. 2002)).

4 Here, because there was no affirmative finding of malingering, the ALJ was  
5 required to provide clear and convincing reasons for concluding that Plaintiff’s subjective  
6 complaints were not wholly credible.

7 **ii. The ALJ did not err in discounting Plaintiff’s testimony.**

8 With regard to Plaintiff’s testimony, the ALJ first found that Plaintiff’s medically  
9 determinable impairments could reasonably be expected to cause the alleged symptoms.  
10 (AR 21.) The ALJ then found Plaintiff’s statements regarding the intensity, persistence,  
11 and limiting effects of the symptoms not entirely credible. (*Id.*)

12 At the hearing, Plaintiff testified that she cannot work because she experiences  
13 neck pain every day and has pain in her shoulders, back, and feet. (*Id.* at 45.) She can  
14 only stand for a “few minutes” before feeling faint, has “chronic fatigue,” lays down for a  
15 couple of hours or more during the day due to pain and fatigue, and spends most of the  
16 day in a reclining position. (*Id.* at 45-46, 52.) She also testified that she cannot perform  
17 household chores, has low energy, and will unintentionally fall asleep on “a Monday, and  
18 [wake] up on a Wednesday.” (*Id.* at 48, 55.) She estimated that she could lift no more  
19 than five pounds. (*Id.* at 46.)

20 Further, she claimed she becomes “overwhelmed,” has anxiety, and has trouble  
21 concentrating. (*Id.* at 56.) Plaintiff testified she could neither prepare meals nor  
22 complete household chores and has gone “dumpster diving to get food.” (*Id.* at 48.) She  
23 takes a trolley to the store “now and then,” feeds her pets, and visits with neighbors. (*Id.*  
24 at 46, 48, 50.)

25 The ALJ found Plaintiff’s testimony regarding the severity of her symptoms not  
26 fully credible because: (1) Plaintiff’s testimony is inconsistent with her work history; (2)  
27 Plaintiff’s testimony is inconsistent with her treatment history; (3) Plaintiff’s testimony is  
28 inconsistent with other medical opinion evidence; (4) the severity of Plaintiff’s symptoms  
are not supported by objective medical evidence; (5) Plaintiff’s alleged asthma is

1 inconsistent with her failure to stop smoking; and (6) the ALJ found evidence in the  
2 record that Plaintiff is experiencing financial difficulties and “may have a motive other  
3 than disability for seeking benefits.” (*Id.* at 21-22.)

4 The Court finds that the ALJ provided clear and convincing reasons supported by  
5 substantial evidence for discounting Plaintiff’s testimony. First, the ALJ properly  
6 considered Plaintiff’s work history in discounting her symptom testimony. More  
7 specifically, the ALJ cited to evidence in the record that Plaintiff experienced symptoms  
8 of peripheral neuropathy after undergoing radiation and chemotherapy in 1995, including  
9 “chronic fatigue, [and] a decreased sensation of both feet.” (*Id.* at 410.) However,  
10 Plaintiff worked full-time at her past employment as an insurance broker for  
11 approximately nine years after her chronic fatigue and decreased sensation of both feet  
12 began in 2000. (*Id.* at 60, 184-85, 410.) And, the ALJ noted that although Dr. Yuzak  
13 found Plaintiff had sensitivity in her feet during his examination, the medical record  
14 evidence does not indicate Plaintiff’s peripheral neuropathy worsened.

15 In response, Plaintiff argues that her condition has worsened more recently. In  
16 support of this argument, she cites to her reports to Dr. Yuzak during his examination that  
17 “she cannot feel her feet,” and her statement during the hearing that her condition has  
18 worsened. (Doc. 21 at 24; AR 410, 52-53.) However, Plaintiff fails to point to any other  
19 evidence in the record, including any treatment records, that indicate her condition  
20 worsened from 2000 to the present. Further, Plaintiff reported to Dr. Yuzak that the  
21 decreased sensation in her feet began about five years after her chemotherapy. (AR 410.)  
22 Therefore, the ALJ properly discounted Plaintiff’s testimony regarding her symptoms  
23 based on Plaintiff’s work history. *See Gregory v. Bowen*, 844 F.2d 664, 667 (9th Cir.  
24 1988) (upholding adverse credibility determination where there was substantial evidence  
25 in the record that the plaintiff’s “back problems had not prevented her from working” for  
26 years).

27 The ALJ also properly discounted Plaintiff’s symptom testimony because it was  
28 inconsistent with her treating physician’s continued recommended conservative  
treatment. The ALJ reasoned that because “there were no recommendations for surgery,

1 injections, a TENS unit,” or recommendations to specialists, this “suggests that the  
2 impairment is not as substantial as alleged.” (AR 21.) The ALJ cited to treatment  
3 records showing that Plaintiff’s treatment with Dr. Womack was limited to medication  
4 management. (*Id.* at 21, 23.) Dr. Womack first prescribed Plaintiff the pain medication  
5 Hydrocodone in August 2011 to treat her chronic pain, which she continued to refill  
6 through 2012. (*Id.* at 313, 301.) Dr. Womack changed Plaintiff’s prescription to Percocet  
7 in October 2012 to manage her pain, which she continued to refill through April 2015.  
8 (*Id.* at 277-285, 301, 417-23.) Additionally, Dr. Womack prescribed Plaintiff Prozac in  
9 November 2013 (*id.* at 288) and Trazodone in January 2014 (*id.* at 286) to treat her  
10 depression. The record also reflects that except for two hospital visits in 2008 for mild  
11 peripheral pulmonary embolism, Plaintiff’s medical records largely reported that she was  
12 primarily returning to her primary care doctor to get refills for her prescriptions. (*Id.* at  
13 347-400.) *See Warre v. Comm’r of the Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.  
14 2006) (“Impairments that can be controlled effectively with medication are not disabling  
15 for the purpose of determining eligibility for [disability] benefits.”); *Meanel v. Apfel*, 172  
16 F.3d 1111, 1114 (9th Cir. 1999) (finding that a failure to request “any serious medical  
17 treatment for [claimant’s] supposedly excruciating pain” was adequate reason to reject  
18 the claimant’s pain testimony); *see also Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir.  
19 1995) (evidence of “conservative treatment” is sufficient to discount a claimant’s  
20 testimony regarding severity of an impairment).

21 Plaintiff claims in her Reply that Dr. Womack did not refer her to specialists or  
22 recommend additional care because he knew she could not afford it. (Doc. 26 at 5.)  
23 However, Plaintiff fails to point to any evidence in the record to support this contention,  
24 other than the fact that Plaintiff is noted in some records to not have health insurance.  
25 Further, a review of the record indicates that Dr. Womack did refer Plaintiff to specialists  
26 when he thought it was appropriate, including a psychologist for testing, a dermatologist  
27 for a skin lesion, and an eye doctor. (AR 353, 356, 420.) However, outside of one  
28 referral for a cortisone shot based on Plaintiff’s request, Dr. Womack did not indicate  
referrals were required to manage Plaintiff’s fatigue or pain symptoms. (*Id.* at 276-407,

1 417-23.) Therefore, Plaintiff's claim that Dr. Womack failed to recommend more  
2 treatment for Plaintiff because he knew she could not afford it is speculative and  
3 unsupported by record evidence.

4 Further, although the record includes evidence that Plaintiff has quite limited  
5 financial resources, Plaintiff fails to cite to any record evidence that Plaintiff did not  
6 request or obtain additional treatment for her pain and fatigue *because* she could not  
7 afford it. Notably, during the hearing, Plaintiff did not claim that she would have sought  
8 additional treatment related to her fatigue and pain had she been able to afford it. Rather,  
9 she testified she was supposed to make a follow up appointment with her oncologist, but  
10 "can't remember what happened," on one occasion, she didn't stay at the hospital for the  
11 full recommended amount of time because she had to feed her mother's animals, she was  
12 referred for physical therapy, but she thought it was ineffective and a waste of time, and  
13 she was referred to a pain clinic, but she didn't want to take the medication they  
14 prescribed her because she thought it was too strong. (*Id.* at 39, 43, 47-48, 54.).  
15 Accordingly, the ALJ properly considered Plaintiff's recommended conservative  
16 treatment history with Dr. Womack in discounting Plaintiff's testimony.

17 The ALJ also discounted Plaintiff's testimony due to inconsistencies with the  
18 other medical opinion evidence and clinical findings. Specifically, the ALJ cited to Dr.  
19 Yuzak's examination findings and opinions, which the Court has addressed at length  
20 above. Dr. Yuzak's opinions, based on his examination findings, contradict Plaintiff's  
21 allegations regarding the severity of her symptoms, particularly that she is required to lay  
22 down for hours during the day due to chronic fatigue. The Court finds these  
23 inconsistencies are a clear and convincing reason supported by substantial evidence for  
24 discounting Plaintiff's testimony. "Contradiction with the medical record is a sufficient  
25 basis for rejecting the claimant's subjective testimony." *Carmickle*, 533 F.3d at 1161  
26 ("The ALJ also rejected Carmickle's testimony that he can lift only 10 pounds  
27 occasionally in favor of Dr. Patton's contradictory opinion that he can lift up to 10  
28 pounds frequently. . . . we conclude [this reason is] supported by substantial evidence in  
the record.")



1           The ALJ also properly considered, as one factor, the lack of support in the medical  
2 records for Plaintiff's assertion that she suffered from disabling symptoms. As stated  
3 above, the ALJ cited to an imaging center's consultation report that described Plaintiff's  
4 spinal impairment as "small hypertrophic spurs on the lower thoracic and lumbar spine."  
5 (AR 21, 75, 406.) As also stated above, the ALJ also cited to Dr. Yuzak's consultative  
6 exam, which "revealed no paravertebral muscle spasms, tenderness, crepitation, effusion,  
7 deformities or trigger point tenderness." (*Id.* at 413.) Further, the ALJ noted that the  
8 treatment records from Plaintiff's treating physician do not contain detailed physical  
9 examinations or objective findings to support Plaintiff's claims regarding the severity of  
10 her symptoms. (*Id.* at 22-23.) A lack of objective medical evidence may not be the sole  
11 reason for the ALJ to discredit a claimant's testimony, but it is one factor that may be  
12 considered. *Rollins*, 261 F.3d at 857 ("while subjective pain testimony cannot be rejected  
13 on the sole ground that it is not fully corroborated by objective medical evidence, the  
14 medical evidence is still a relevant factor in determining the severity of claimant's  
15 pain...").

16           The remaining reasons the ALJ gave for discrediting Plaintiff's symptom  
17 testimony are not supported by substantial evidence. The ALJ erroneously relied on  
18 Plaintiff's smoking to adversely impact her credibility because it is possible Plaintiff is  
19 addicted to cigars and therefore continues to smoke even though she suffers from asthma.  
20 *See Bray*, 554 F.3d at 1227 (considering the adverse impact of a smoking addiction on  
21 plaintiff's credibility); *see also Shramek v. Apfel*, 226 F.3d 809, 812-13 (7th Cir. 2000)  
22 (noting, in dicta, that it is "extremely tenuous" to discredit a claimant's description of her  
23 impairments based on claimant's continued smoking because of nicotine's addictive  
24 properties).

25           The ALJ's finding that Plaintiff "may have a motive other than disability for  
26 seeking benefits" is also not supported by substantial evidence. (AR 22.) The ALJ does  
27 not provide citations to the record that support a finding that Plaintiff is seeking benefits  
28 for money alone, not because she is actually disabled. *See Cha Yang v. Comm'r of Soc.*  
*Sec. Admin.*, 488 F. App'x. 203, 205 (9th Cir. 2012) (unpublished) (considering a

1 plaintiff's desire to obtain benefits motivated by financial hardship and finding that "if a  
2 petitioner's desire or expectation of obtaining benefits were by itself sufficient to  
3 discredit a claimant's testimony, then no claimant would ever be found credible.")

4 However, the Court finds that the ALJ's reliance on Plaintiff's continued smoking  
5 and financial hardship, even if erroneous, amounts to harmless error with regard to  
6 analyzing Plaintiff's severe physical impairments. *See Batson*, 359 F.3d at 1197  
7 (concluding, even if the record did not support one of the ALJ's state reasons for  
8 disbelieving a claimant's testimony, the error was harmless).

9 **IV. Remand for further proceedings is appropriate here.**

10 Having determined that the ALJ committed harmful error in dismissing Plaintiff's  
11 mental impairments at step two, the Court must vacate the Commissioner's decision. The  
12 remaining issue for the Court is whether to remand this matter for an award of benefits or  
13 for further proceedings. Such a determination is within the Court's discretion. *Smolen*,  
14 80 F.3d at 1292.

15 In order to determine when it is appropriate to remand for benefits versus further  
16 administrative proceedings, the Ninth Circuit has established a three-part test. First, a  
17 court must determine whether "the ALJ has failed to provide legally sufficient reasons for  
18 rejecting evidence, whether claimant testimony or medical opinion." *Treichler v. Comm'r*  
19 *of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014). Second, the court must  
20 determine "whether the record has been fully developed, whether there are outstanding  
21 issues that must be resolved before a determination of disability can be made, and  
22 whether further administrative proceedings would be useful." *Id.* Third, if the court  
23 "concludes that no outstanding issues remain and further proceedings would not be  
24 useful, [the court] may...find[] relevant testimony credible as a matter of law" and  
25 remand for benefits." *Id.* "When an ALJ's denial of benefits is not supported by the  
26 record, the proper course, except in rare circumstances, is to remand to the agency for  
27 additional investigation or explanation." *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th Cir.  
28 2012) (quotation omitted).

1 Because the ALJ committed harmful error at step-two, the Court finds there are  
2 remaining issues for the ALJ to resolve. Specifically, the ALJ must evaluate the impact  
3 of Plaintiff's mental impairments throughout the remainder of the sequential analysis.  
4 The Court will therefore remand this case for further proceedings.

5 Accordingly,

6 **IT IS ORDERED** that the Commissioners' decision is vacated and this matter is  
7 remanded to the Commissioner for further administrative proceedings consistent with this  
8 Order.

9 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment  
10 accordingly and terminate this case.

11 Dated this 31st day of March, 2017.

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15 Honorable John Z. Boyle  
16 United States Magistrate Judge  
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